Assessing 'Concreteness' Under Spokeo In Northern Illinois

By **Alex Egbert and Tony Hopp**
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The U.S. Supreme Court's 2016 decision in Spokeo Inc. v. Robins[1] compelled the Northern District of Illinois, like all federal courts, to update the way it determines whether plaintiffs have Article III standing to bring statutory violation claims.

Article III of the Constitution limits federal courts' jurisdiction to "cases and controversies."[2] Accordingly, plaintiffs who fail to show that their suits represent actual "cases and controversies" lack Article III standing to bring their claims.[3] So, to establish standing, plaintiffs must show three things:

1. The plaintiff suffered an "injury-in-fact;"

2. The injury is "fairly traceable" to the defendant's alleged misconduct; and

3. The injury is "likely to be redressed by a favorable judicial decision."[4]

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Spokeo held that the first standing element — "injury-in-fact" — has no less than three distinct sub-elements. Under Spokeo, plaintiffs must make separate and distinct showings that their alleged injuries were—

(a) "Concrete";
(b) "Particularized"; and
(c) "Actual or imminent, not conjectural or hypothetical."[5]

Spokeo set some basic parameters for, but did not fully define, what it means for an injury to be "concrete." First, "[a] 'concrete' injury must be 'de facto'; that is, it must actually exist."[6] Second, the term "concrete" is "meant to convey the usual meaning of the term — 'real,' and not 'abstract.'"[7] But, third, "'[c]oncrete' is not ... necessarily synonymous with 'tangible.' ... [I]ntangible injuries can nevertheless be concrete."[8] Fourth, "[i]n determining whether an intangible harm constitutes injury in fact, both history and the judgment of Congress play important roles." Spokeo made a passing reference to, but did not describe, history's and Congress' "important roles."

With respect to history's role, Spokeo counsels, "it is instructive to consider whether an alleged intangible harm has a close relationship to a harm that has traditionally been regarded as providing a basis for a lawsuit in English or American courts."[9] While Spokeo does not direct what courts should do after considering whether analogous common law injuries exist, presumably a plaintiff will have standing if the plaintiff's alleged injury resembles an injury that was sufficient to confer standing under the common law.

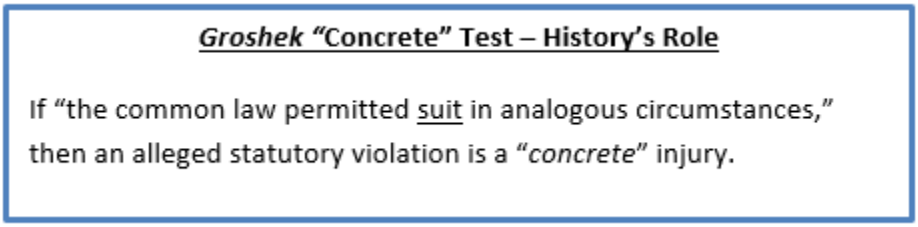
With respect to Congress' role, Spokeo's guidance is a bit more opaque. In one paragraph, Spokeo notes that Congress' "judgment is ... instructive and important."[10] But in the next paragraph, Spokeo instructs courts to override Congress' judgment if the law in question "grants a person a statutory right" but the violation of such right is "divorced from any concrete harm."[11]

In short, Spokeo left it to the lower courts to flesh out history's and Congress' "important roles," and in turn, to develop a workable legal standard for determining whether an intangible injury — like a statutory violation — is sufficiently "concrete" to constitute an "injury-in-fact."

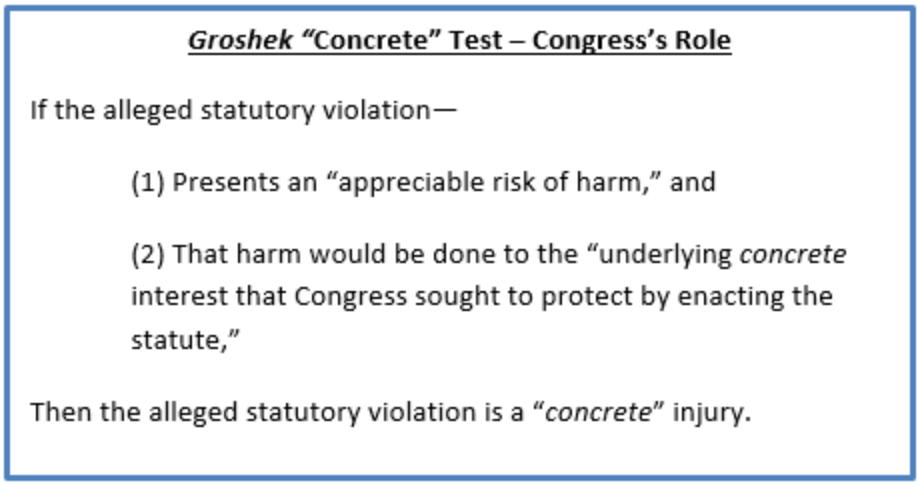
How the Seventh Circuit has Interpreted Spokeo

The Seventh Circuit addressed history's and Congress' roles in Groshek v. Time Warner Cable, in the context of a Fair Credit Reporting Act violation.[12]

To explain history's role, the Seventh Circuit paraphrased Spokeo: "We consider whether the common law permitted suit in analogous circumstances."[13] This paraphrasing, however, replaces Spokeo's specification that the plaintiff's "harm" be analogous to a common law "harm" with the generalization that the "suit" be analogous to a common law "suit." This is a subtle distinction. After all, a plaintiff's "harm" — along with the defendant's wrongdoing — comprises a cause of action, or "suit." This subtle distinction had no bearing on the Seventh Circuit's ultimate "concreteness" determination in Groshek because the court's analysis did not actually "consider whether the common law permitted suit in analogous circumstances" to the FCRA claim at issue. Instead, the Seventh Circuit's determination turned on "Congress' role."



As to Congress' role, the Seventh Circuit held that "the plaintiff must show that the statutory violation presented an 'appreciable risk of harm' to the underlying concrete interest that Congress sought to protect by enacting the statute."[14] Applying this new standard, the Seventh Circuit found that, in enacting the FCRA, Congress sought to protect consumers' interest in "fair and accurate credit reporting" and "privacy."[15] Because the Groshek defendant's alleged FCRA violation — failing to exclude extraneous information from a disclosure statement — would not harm those underlying interests that Congress sought to protect, the Seventh Circuit concluded that the plaintiff did not suffer a "concrete" injury.[16]



On its face, the Groshek standard is arguably circular. For a harm to be "concrete," under the standard, the underlying interest harmed must be "concrete." More precisely, to show that an alleged harm to a statutorily granted interest is "concrete," plaintiffs must show that the underlying interest that Congress sought to protect in enacting the statute is "concrete." But the Seventh Circuit does not otherwise define what it means to be "concrete." This, "you'll know it when you see it" standard is like training umpires to call "strikes" whenever a pitch is in the "strike zone" without defining the boundaries of the "strike zone."

Northern District of Illinois "Concreteness" Determinations

Not surprisingly, the Northern District of Illinois "concreteness" determinations relying on Congress' role, tend to be ad hoc. They diverge depending on how individual judges define the "underlying concrete interest" that Congress intended the allegedly violated statute to protect.

For example, in both Gritters v. Ocwen and Zuniga v. Asset Recovery Sols. the plaintiffs alleged that the defendants had violated the Fair Debt Collection Practices Act by failing to disclose creditors' identities.[17] But the Gritters court, unlike the Zuniga court, saw no need under Groshek to determine whether the "underlying ... interest that Congress sought to protect by enacting" the FDCPA was itself "concrete."[18] For the Gritters court, it was sufficient that Congress created a statutory interest and that the defendant violated it.[19] For the Zuniga court, the statutory violation, itself, was insufficient unless the plaintiff could also show that the invasion of his statutory interest, in turn, invaded a more "concrete" underlying interest, which the court identified as his interest in not giving money to the wrong creditor.[20]

What is more, the Northern District of Illinois "concreteness" determinations analyze history's role differently. The determinations relying on history's role diverge depending on whether a court specifically requires that the *plaintiff's "harm"* be analogous to a common law "harm," as Spokeo explicitly requires. Some Northern District of Illinois "concreteness" determinations, in contrast (perhaps sidetracked by Groshek's substitution of "suit" for "harm"), require only that the *defendant's actions* be analogous to actions that could give rise to common law liability. These decisions are unconcerned whether the plaintiff, in fact,

suffered something analogous to a common law injury.

For example, in both Aguilar v. Rexnord LLC and Aguirre v. Absolute Resolutions Corp. the plaintiff alleged common law injuries resulting from the defendant's statutory violation.[21] But Aguilar held that the mere allegation was insufficient to support standing, while Aguirre held it was not. Focusing on the *plaintiff's harm*, Aguilar held that the plaintiff needed to further allege how the Illinois Biometric Information Privacy Act, or BIPA, violation could have led to the alleged common law injury, the alleged invasion of the plaintiff's subjective sense of privacy.[22] Focusing on the *defendant's actions*, Aguirre was unconcerned about the harm the plaintiff ultimately suffered, holding that it was sufficient that the defendant's alleged Fair Debt Collection Practices Act violation resembled actions constituting common law fraud.[23] In short, Aguilar cared that the plaintiff actually suffered an injury analogous to a common law injury (as Spokeo specifies) while Aguirre cared only that the defendant's actions were analogous to actions that could give rise to common law liability.

Predicting How a Northern District of Illinois Court Will Come Out on a "Concrete" Determination

As the table below demonstrates, the best way to predict how a Northern District of Illinois court will come out on a particular "concreteness" determination is to identify the statute that the defendant allegedly violated. Take the most commonly litigated statute, the FDCPA; in 12 of the 14 post-Groshek FDCPA cases addressing standing, the Northern District of Illinois court held that the plaintiff's injury was "concrete." Similarly, the Northern District of Illinois held that the plaintiffs' injuries were "concrete" in all five post-Groshek Telephone Consumer Protection Act[24] cases, but were not "concrete" in all five post-Groshek FCRA cases.

One reason for this emerging intra-statute consistency amidst inter-statute inconsistency is that Northern District of Illinois decisions are increasingly sidestepping Groshek's fuzzy standards. Instead of separately analyzing whether each plaintiff at bar suffered a "concrete" harm, Northern District of Illinois decisions are recognizing or rejecting plaintiffs' standing by adopting wholesale standing determinations from prior cases where the prior defendants violated the same statutes. So until the Supreme Court or the Seventh Circuit provides more instruction on what it means for an injury to be "concrete," it appears Northern District of Illinois decisions will continue to be consistently inconsistent.

Case	Statutory Violation	Standing	Reason
Monroy v. Shutterfly Inc.	BIPA	Yes	History
Aguilar v. Rexnord LLC	BIPA	No	History; Congress
Daugherty v. University of Chicago	ERISA[25]	No	Precedent
Bozek v. Bank of America NA	FCRA	No	Conclusory
Ratliff v. Celadon Trucking Services Inc.	FCRA	No	History; Congress
Ratliff v. A&R Logistics Inc.	FCRA	No	History; Congress
Adefeyinti v. Experian Information Solution Inc.	FCRA	No	Conclusory
Crabtree v. Experian Information Solutions Inc.	FCRA	No	History; Congress
Gritters v. Ocwen Loan Servicing LLC	FDCPA	Yes	Congress
Marquez v. Weinstein, Pinson & Riley PS	FDCPA	Yes	Congress
Lopez v. Global Credit & Collection Corp.	FDCPA	Yes	Congress
Flores v. Portfolio Recovery Associates LLC	FDCPA	Yes	Congress
Wheeler v. Midland Funding LLC	FDCPA	Yes	Congress
Baranowski v. Portfolio Recovery Associates LLC	FDCPA	Yes	Congress
Zuniga v. Asset Recovery Solutions	FDCPA	No	Congress
Aguirre v. Absolute Resolutions Corp.	FDCPA	Yes	History; Congress
Ferris v. Transworld Systems Inc.	FDCPA	Yes	History; Congress
Wolter v. Anselmo Lindberg Oliver LLC	FDCPA	No	Precedent
McMahon v. LVNV Funding LLC	FDCPA	Yes	Precedent
Keys v. Collection Professionals Inc.	FDCPA	Yes	Precedent
Bass v. I.C. System Inc.	FDCPA	Yes	Precedent
Rodriguez v. Codilis & Associates PC	FDCPA	Yes	Precedent
Ferenzi v. City of Chicago	FLSA[26]	No	Other
Vega v. Mid America Taping & Reeling Inc.	FLSA	No	History; Congress
LAF v. Department of Veterans Affairs	FOIA[27]	Yes	Precedent
Erin Terrazzino v. Wal-Mart Stores Inc.	ICFA[28]	Yes	Conclusory
Block v. Lifeway Foods Inc.	ICFA; State Consumer Fraud Laws	Yes	Conclusory
Toney v. Quality Resources Inc.	TCPA	Yes	Precedent
Barrera v. Guaranteed Rate Inc.	TCPA	Yes	Precedent
Practice Management Support Services Inc. v. Cirque du Soleil Inc.	TCPA	Yes	Precedent
Yates v. Checkers Drive-In Restaurants Inc.	TCPA	Yes	Precedent
Abante Rooter & Plumbing Inc. v. Oh Insurance Agency	TCPA	Yes	History; Congress
Postle v. Allstate Insurance Company	TCPA	Yes	Congress

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[1] Spokeo Inc. v. Robins, 136 S.Ct. 1540 (2016)

[2] U.S. Const. art. III, § 1.

[3] E.g., Lujan v. Defs. of Wildlife, 504 U.S. 555, 560 (1992).

[4] Id. at 560–61.

[5] Spokeo, Inc. v. Robins, 136 S. Ct. 1540, 1550 (2016) (reversing and remanding the Ninth Circuit's standing determination because the Ninth Circuit failed to analyze whether the alleged statutory violation constituted a "concrete" injury after determining only that it was "particularized").

[6] Id. at 1548.

[7] Id.

[8] Id. at 1549.

[9] Id.

[10] Id.

[11] Id.

[12] Groshek v. Time Warner Cable Inc., 865 F.3d 884 (7th Cir. 2017).

[13] Id. at 887.

[14] Id. at 887.

[15] Id.

[16] Id. at 888.

[17] Gritters v. Ocwen Loan Servicing LLC, 14 C 916, 2018 WL 1784134, **3-4 (N.D. Ill. 2018); Zuniga v. Asset Recovery Sols., 17-CV-05119, 2018 WL 1519162, *1 (N.D. Ill. 2018).

[18] If Gritter's failure to consider the "concreteness" of the harmed underlying interest was a sin of omission, the similar action in Lopez v. Glob. Credit & Collection Corp., 17 CV 427, 2017 WL 4340098 (N.D. Ill. 2017) was a sin of commission. There, the Northern District of Illinois explicitly endorsed the same move the Gritter's court made, holding that that it made no difference for the "concrete" analysis whether a FDCPA-violating misrepresentation "subjectively deceived" the plaintiff-debtor — even though a lack of subjective deceit would obviate the risk that the misrepresentation would cause the plaintiff to suffer actual financial harm.

[19] Gritters at 4.

[20] Zuniga v. Asset Recovery Sols., 17-CV-05119, 2018 WL 1519162, at *3 (N.D. Ill. 2018).

[21] Aguilar v. Rexnord LLC, 17 CV 9019, 2018 WL 3239715, *4 (N.D. Ill. 2018); Aguirre v. Absolute Resolutions Corp., 15 C 11111, 2017 WL 4280957, *3 (N.D. Ill. 2017).

[22] Aguilar at *4 (holding that that "any privacy injury is conjectural" because plaintiff did not allege that the defendant had or was going to actually disclose the plaintiff's biometric information).

[23] Aguirre at *3 (holding that the Defendant's alleged actions constitution a FDCPA violation—sending a debt collection letter that "contained threatening language which Defendants could not, and did not, act upon in the attempt to collect on a debt"—"is well within the heartland of common law fraud").

[24] "Telephone Consumer Protection Act"

[25] "Employee Retirement Income Security Act"

[26] "Fair Labor Standards Act"

[27] "Freedom of Information Act"

[28] "Illinois Consumer Fraud & Deceptive Business Practices Act"